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No. 1078

In the Supreme Court of the United States

OCTOBER TERM, 1967

LOU JOHN LOUIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Assistant Attorney General,

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of violating 18 U.S.C. 371 by conspiring with one Binkley to steal and convert (in violation of 18 U.S.C. 641) a quantity of small arms ammunition belonging to the United States and worth more than $100, and of violating that substantive statute. He was sentenced to concurrent terms under the provisions of the Youth Corrections Act, 18 U.S.C. 5010(b) and 5017(c).

Petitioner's principal contention, as in the court below, is that the district court erred in refusing to dismiss the conspiracy count after the conspiracy charge against Binkley was dismissed on the government's motion at the plea stage.

At the arraignment petitioner pleaded not guilty to both counts of the indictment and Binkley pleaded not guilty to count 1, the only count in which he was named. The Assistant United States Attorney then moved for dismissal of count 1 as to Binkley, because the conspiracy alleged therein formed a part of another conspiracy charge pending against Binkley in the same court in a case which had been simultaneously called (Arr. Tr. 8).[1] When Binkley pleaded guilty to the other conspiracy charge (Arr. Tr. 9-11), the district court granted the government's motion to discontinue the similar charge in this case (Pet. App. C). Thereafter, petitioner unsuccessfully moved that count 1 of the present indictment be dismissed as to him, the case went to trial, and petitioner was convicted on both counts. The court of appeals affirmed (Pet. App. A).

Petitioner's theory is that, once the conspiracy count was dismissed as to Binkley, there was no one remaining with whom it was alleged he had conspired. Courts have treated a verdict of acquittal of an alleged co-conspirator as amounting to a finding that he was not a participant in the conspiracy, so that if only two persons are charged as members of

[1] "Arr. Tr." refers to the transcript of the arraignment proceedings, a copy of which is lodged with the Clerk of this Court.

the conspiracy the acquittal of one co-conspirator would necessitate acquittal of the other. See *e.g.*, *United States* v. *Gordon*, 242 F.2d 122, 125 (C.A. 3), certiorari denied, 354 U.S. 921. But the fallacy in petitioner's position is that it attempts to equate the dismissal of the conspiracy count on the government's pre-trial motion with the hypothetical situation of an acquittal of participation in the conspiracy. The government's recommendation that the conspiracy indictment be dismissed as to Binkley because he was about to plead guilty to a separate similar charge, clearly does not amount to a legal or logical determination of his non-involvement in the conspiracy, barring trial of his co-conspirator.[2]

As the court of appeals noted (Pet. App. A), convictions for conspiracy have been sustained where a nolle prosequi has been entered as to the only other alleged co-conspirator, *United States* v. *Fox*, 130 F. 2d 56, 57-59 (C.A. 3), certiorari denied, 317 U.S. 666; *United States* v. *Shipp*, 359 F.2d 185, 189 (C.A. 6), certiorari denied, 385 U.S. 903, and even where the other co-conspirator is immune from prosecution. *Farnsworth* v. *Zerbst*, 98 F.2d 541, 544 (C.A. 5). This case follows *a fortiori* from these decisions.

We point out, in addition, that there is no challenge to the sufficiency of the evidence on the sub-

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[2] Indeed, in this case, the existence of a conspiracy was confirmed at trial by Binkley's testimony that he had purchased stolen ammunition from petitioner, after petitioner had approached him and suggested the transaction (petitioner having heard that Binkley was in the business of buying stolen ammunition). Tr. 19-24, 32, 35 (lodged with the Clerk of this Court).

stantive count,[3] and the court imposed concurrent sentences on both counts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Petitioner asserts, however, that if count 1 was wrongly retained, his conviction on count 2 must also be reversed, since the evidence relating to the conspiracy might not have been relevant, in toto, to the substantive count. Petitioner makes no attempt, however, to suggest what evidence might have been excludable if the conspiracy charge had been dropped, nor does he explain why any extraneous evidence might have been prejudicial. It seems clear, moreover, that the evidence of the plan which underlay the substantive offense would have been admissible on the substantive count alone.

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